STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY BENNETT O'BRIEN,

Defendant-Appellant.

UNPUBLISHED
February 25, 2000

No. 213739
Allegan Circuit Court
LC No. 97-010588-FH

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his May 26, 1998, jury trial conviction of malicious destruction of personal property over $100, MCL 750.377a; MSA 28.609(1). Defendant was sentenced to a prison term of two to four years. We affirm.

In this case arising out of the illegal destruction of a Coke machine, defendant first argues on appeal that there was insufficient evidence presented at trial to establish that there was over $100 damage done to the Coke machine. We disagree. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

Defendant relies on the case of *People v Hamblin*, 224 Mich App 87; 568 NW2d 339 (1997), to support his contention that the fair market value of the property must be conclusively established at trial in order to support a conviction for malicious destruction of property over $100. However, the burden of the prosecutor under the *Hamblin* test is to establish either "the difference in the property's fair market value [before and after the injury] or the reasonable cost to repair or restore the property." *People v LaBelle*, 231 Mich App 37, 38; 585 NW2d 756 (1998), quoting *Hamblin, supra* at 96. Where the damage is repairable, "the appropriate measure of economic loss will generally be the reasonable cost of repair or restoration." *Hamblin, supra* at 95, citing *People v Dunoyair*, 660 P2d 890, 894-895 (Colo, 1983).

Here, it was established at trial that the Coke machine was repairable, and the reasonable cost of repairing it was between $600 and $800. The fact that complainant chose the more expensive option of replacing the machine is irrelevant. Viewing the evidence presented at trial in a light favorable to the prosecutor, we find that there was sufficient evidence to support defendant's conviction for malicious destruction of property over $100.

Defendant next argues that he is entitled to resentencing because the court improperly punished him for committing perjury. We disagree. Provided permissible factors are considered, our review is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. *Id*. at 636.

Our Supreme Court has stated that a sentencing court may not punish a defendant for perjury. *People v Adams*, 430 Mich 679, 689; 425 NW2d 437 (1988). However, the Court has also stated that "[i]n imposing sentence, a trial court may consider a defendant's own perjury where there is a rational basis in the record for concluding that the defendant wilfully made a flagrant false statement on a material issue." *People v Houston*, 448 Mich 312, 324; 532 NW2d 508 (1995). Thus, a defendant's perjury, as it relates to the defendant's "prospects for rehabilitation," may be considered by a sentencing court. *Adams, supra* at 693.

Here, defendant is correct that the court's statement that its departure from the guidelines was based on defendant's perjury "alone" seems to indicate that the court acted improperly. However, when this statement is considered in the context of the court's entire articulation of sentence, it is clear that the perjury was properly considered as a factor in determining defendant's prospects for rehabilitation. The court's statements indicate a finding that defendant's perjury under oath circumstantially established "the absence of a character trait for being law-abiding." *Adams, supra* at 693-694. This finding may properly be considered during a court's imposition of sentence. *Id.* The court did not abuse its discretion by considering defendant's false testimony during its assessment of defendant's character.

The court's determination that defendant committed perjury was rationally based on record evidence. The testimony of Craig Demond regarding the events of August 2, 1997, was supported by the testimony of Officer Reyes. However, defendant's testimony regarding the events of that evening directly contradicts the testimony of both Demond and Reyes. Contrary to their testimony, defendant testified that he was never near the pay phone outside the store. Defendant's testimony directly contradicts Demond's testimony that he saw defendant hitting the machine before he called the police. Furthermore, defendant contradicted himself while he testified. On direct examination, defendant stated that he was returning home after visiting a bowling alley and a bar when he was approached by Reyes. However, during cross-examination defendant stated that he was on his way to the bowling alley when Reyes called to him. The fact that defendant contradicted himself while testifying, and the fact that his testimony was completely contrary to the testimony of Demond and Reyes, support the sentencing court's conclusion that defendant's testimony amounted to "wilful, material, and flagrant perjury." *Adams, supra* at 693. Because the lower court did not err by considering defendant's false

testimony as an indication of his poor prospects for rehabilitation, we find that defendant is not entitled to resentencing.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra